NOTTINGHAM et al. *v.* ACKISS.

March 10, 1910.

[67 S. E. 351.]

1. Debt, Action of (§ 1*)—Nature of Action.—The action of debt lies only for the recovery of a certain sum of money due by a certain and express agreement.

[Ed. Note.—For other cases, see Debt, Action of, Cent. Dig. § 1; Dec. Dig. § 1.* 4 Va.-W. Va. Enc. Dig. 275.]

2. Bills and Notes (§ 468*)—Collateral Agreement—Action—Pleading.—Where the parties to a note for the price of land agreed in writing that the note, though payable on demand, should be paid only on condition of a resale of all or a part of the land and the price thereof being realized, a declaration on the note does not state a cause of action, if it fails to allege, not only a sale of the land, but also the payment by the purchaser of the price, and when the same was paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1462, 1463; Dec. Dig. § 468.* 4 Va.-W. Va. Enc. Dig. 286; 14 id. 309.]

Error to Law and Chancery Court of City of Norfolk.

Action by one Ackiss, as assignee, against F. E. Nottingham and others on a note. Plaintiff had judgment, and defendants bring error. Reversed.

Burroughs & Bro., for plaintiffs in error.
Wm. McK. Woodhouse, for defendant in error.

SOUTHERN RY. CO. *v.* LEWIS.

March 10, 1910.

[67 S. E. 357.]

1. Master and Servant (§ 105*)—Injuries to Servant—Care Required of Master.—The ordinary care which a master is required to exercise to furnish a reasonably safe place to work is to be determined by the general usages of the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 105.* 9 Va.-W. Va. Enc. Dig. 689; 14 id. 689.]

2. Master and Servant (§ 293*)—Injuries to Servant—Action—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car, was injured by being struck by a switch target, the evidence showed that the switch stand was one in common use by defendant and other railroads, and that it was placed, as all such stands were placed by defendant and other railroads, so as to leave a space of two feet between the lamp and the side of any car,

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

and the court instructed that it was the duty of defendant to furnish plaintiff a reasonably safe place for the performance of his duties. Held, that the instruction was erroneous, as leaving out of view the important limitation that the master is only bound to exercise ordinary care for the safety of the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.* 9 Va.-W. Va. Enc. Dig. 669-671, 676, 689, 690.]

3. Master and Servant (§ 293*)—Injuries to Servant—Instructions.—It was error to instruct that, if the jury believed that plaintiff sustained his injuries while using reasonable care in the performance of his duties, and that his injuries resulted from the fact that the switch stand and lamp were placed in too close proximity to the track, they must find for plaintiff, since it left the jury to determine what was "in too close proximity," and they were not told that, if the stand was negligently placed too near or nearer than usual and customary, defendant was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.* 10 Va.-W. Va. Enc. Dig. 418; 14 id. 775.]

4. Master and Servant (§ 293*)—Injuries to Servant—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car, was struck by a switch target, the evidence showed that it was the standard switch stand in common use by defendant and other railroads, and placed at the distance that all such stands were placed by defendant and other railroads, so as to leave a space of two feet between the lamp and the side of a car, and the court refused to instruct that ordinary care is such care as reasonably prudent men exercise in the conduct of a like business, and that if the switch stand was a standard switch stand in common use, and placed no nearer the track than customary, and the car was of the ordinary and usual width, the verdict must be for defendant. Held, that the instruction was warranted by the evidence, and should have been given.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.* 9 Va. W. Va. Enc. Dig. 675, et seq.; 14 id. 687, 689.]

5. Master and Servant (§§ 101, 102*)—Injuries to Servant—Appliances.—A master is not required to furnish the servant with the newest and best appliances, and he performs his duty when he furnishes those of ordinary character and reasonable safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 181-184; Dec. Dig. §§ 101, 102.* 9 Va.-W. Va. Enc. Dig. 675, et seq.; 14 id. 687, 689.]

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

6. Master and Servant (§ 85*)—Injuries to Servant—Master's Liability.—Masters are liable for the consequences, not of danger, but of negligence, and they are not insurers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 136; Dec. Dig. § 85.* 9 Va.-W. Va. Enc. Dig. 667, 690.]

7. Master and Servant (§ 105*)—Injuries to Servant—Master's Liability.—The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 185-191; Dec. Dig. § 105.* 9 Va.-W. Va. Enc. Dig. 689, et seq.; 10 id. 352; 14 id. 689.]

8. Master and Servant (§ 293*)—Injuries to Servant—Instructions.—In an action for injuries to a brakeman who, while climbing up the side of a car was struck by a switch target, a requested instruction, to the effect that defendant would not be liable if the switch stand was a standard stand, etc., was not erroneous by the use of the word "standard;" the testimony in the case being to the effect that the stand was a standard stand, and one in common use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.* 9 Va.-W. Va. Enc. Dig. 674-676; 1 id. 601.]

Error to Corporation Court of Danville.

Action by W. T. Lewis against the Southern Railway Company. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Wm. Leigh, for plaintiff in error.

B. H. Custer and *Peatross & Harris,* for defendant in error.

GRING *v.* LAKE DRUMMOND CANAL & WATER CO.

March 10, 1910.

[67 S. E. 360.]

1. Pleading (§ 350*)—Motions—Judgment—Pleading.—Plaintiff in assumpsit was entitled to an office judgment for the amount of his claim sued on at the second rules held in the clerk's office, following the filing of his declaration, accompanied by the affidavit, etc., required by Code 1887, § 3286 (Code 1904, p. 1730), to become final on the fifteenth day of the next term of the court, or at the expiration thereof if that occurred before the fifteenth day of the term, unless defendant filed a plea in bar accompanied by affidavit, as required by said statute.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 350.* 8 Va.-W. Va. Enc. Dig. 231, et seq.; 14 id. 603.]

2. Judgment (§ 128*)—Office Judgment—Final Judgment.—Code

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*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.